

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SIDNEY ESIKOFF AND HELEN ESIKOFF ¹	:	ORDER
for Redetermination of a Deficiency or for Refund of	:	DTA NOS. 815861
Personal Income Tax under Article 22 of the Tax Law	:	AND 815862
for the years 1989 and 1990.	:	

Petitioners, Sidney Esikoff and Helen Esikoff (deceased), move for an order vacating or modifying the Division of Taxation's demand for a bill of particulars dated August 7, 1997. The Division of Taxation filed an affidavit in opposition dated September 24, 1997. Petitioners appeared by Cooper, Selvin & Strassberg LLP (Frederic N. Bruckner, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Gary Palmer, Esq., of counsel). After due consideration of the pleadings, the demand for a bill of particulars, the motion for an order vacating or modifying the demand, and the affidavit of the Division's attorney in opposition, Arthur S. Bray, Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Taxation's demand for a bill of particulars calls for items inappropriate to a demand.

FINDINGS OF FACT

1. Petitioners commenced this proceeding by filing petitions for the years 1989 and 1990.² In their respective petitions, the taxpayers disputed the conclusion of the Division of Taxation ("Division") that they were domiciled in New York or that they were statutory residents of New York. Petitioners also challenged the inclusion of alleged tax exempt income and the determination that they were liable for penalties. The petitions further alleged that the Division of Taxation ("Division") examined the taxpayer's books in an arbitrary and unreasonable manner.

¹ Helen Esikoff is now deceased.

² The petition for the year 1989 was filed only on behalf of Sidney Esikoff. The petition for the year 1990 lists both Sidney Esikoff and Helen Esikoff.

2. The Division filed an answer, dated August 7, 1997, which stated, in pertinent part, that prior to January 1, 1989 petitioners were domiciled in New York State and were residents thereof for tax purposes. It also alleged that during the respective years in issue petitioners were resident individuals of New York within the meaning of Tax Law § 605(b)(1)(A) and (B). The answer further maintained that items of New York State source income were not reported for the years 1989 and 1990.

3. The Division served a Demand for a Bill of Particulars, dated August 7, 1997, demanding that petitioners serve a bill of particulars on 17 matters within 30 days after service of the Demand. To the extent that the Demand remains in issue, the Division requested that petitioners provide:

“3. A specification of each day during 1989 and 1990 which said petitioner spent no part of within the State of New York, or in the alternative, specify each day during said years that said petitioner spent any part of within the State of New York.”

4. Petitioners filed a motion, dated August 21, 1997, for an order vacating or modifying the demand for a bill of particulars. In support of the motion, petitioners' representative submitted an affidavit which stated that virtually all, if not all, of the information requested was evidentiary material rather than an expanded statement of the contentions set forth in the petition. It is also argued that most, if not all, of the information requested by the Division is already in the Division's file. According to petitioners, the Division has not made any showing that it reviewed its file to determine what information is already in its possession.

5. In response to the foregoing motion, the Division submitted an affidavit which stated that the Division was withdrawing all of the numbered paragraphs of its demand for a bill of particulars except for paragraph three which is set forth above (Finding of Fact "3"). The Division notes that petitioners deny that Sidney Esikoff was a statutory resident of New York for the years at issue and submits that, for the purpose of avoiding surprise and narrowing the issues, it is entitled to know which days during each of the years at issue petitioners will claim that Sidney Esikoff was outside of New York State.

6. The Division also argues that it is entitled:

“to a bill of particulars specifying each factual basis that the petitioners intend to raise at hearing in support of their contention that Sidney Esikoff was not a domiciliary of New York during the years at issue as well as each factual basis that they intend to raise at hearing in support of their contention that Sidney Esikoff was not a statutory resident of New York State during the years at issue that was not covered in their response to paragraph 3 of the Division's demand for a bill of particulars.”

The information requested in the last sentence was not one of the items requested in the bill of particulars.

7. On October 27, 1997, the Division of Tax Appeals received petitioners' response to the Division's demand for a bill of particulars. With respect to the year 1989, petitioners alleged that the Division issued an information request, dated December 10, 1993, which asked for, among other things, Mr. Esikoff's original diary or a daily breakdown of the days in or out of New York State. After continuing the audit at petitioners' representative's place of business, the Division mailed a schedule entitled "Still Missing from 12/24/93 Letter". The schedule did not indicate that the Division was still missing Mr. Esikoff's original 1989 diary or a schedule of days spent in or out of New York. Petitioners' representative surmises that the conclusion to be drawn is that the Division was furnished with Mr. Esikoff's original 1989 diary or a schedule of the days spent in and out of New York when it was conducting its audit. Petitioners' representative asserts that, after a diligent search, he cannot locate Mr. Esikoff's original 1989 diary or a schedule of days spent in and out of New York. It is petitioners' representative's belief that the foregoing items were given to the Division and not returned. Petitioners' representative then explains that, since he does not have the foregoing items, he can not respond further for the year 1989.

8. Petitioners' representative states that the number of days spent by petitioners in and out of New York during 1990 is summarized in a document entitled "Analysis of Days In & Out of New York". It is alleged that the Division furnished petitioners' representative with this document and that petitioners' representative provided a copy to the Division of Taxation in a letter dated September 19, 1997. According to petitioners' representative, "the schedule of the number of days that petitioners claimed to be in New York is represented in each month's column entitled 'PER T/P Places' and equals 129 days."

CONCLUSIONS OF LAW

A. The Rules of Practice and Procedure of the Tax Appeals Tribunal provide that a party may serve a demand for a bill of particulars upon an adverse party in order "to prevent surprise at the hearing and to limit the scope of proof" (20 NYCRR 3000.6[a][1]). The Rules permit a party to "serve written notice on the adverse party demanding a bill of particulars within 30 days of the date on which the last pleading was served" (*id.*). A party unwilling to give such particulars may move to vacate or modify the demand within 20 days after receipt of the demand (20 NYCRR 3000.6[a][2]). "If no such motion is made, the bill of particulars shall be served within 30 days after the demand, *unless the administrative law judge designated by the tribunal shall direct otherwise*" (20 NYCRR 3000.6[a][2]; emphasis added). If a party fails to furnish the bill of particulars, the party may, upon notice, be precluded by the Administrative Law Judge from giving evidence at the hearing "of items of which particulars have not been delivered" (20 NYCRR 3000.6[a][3]).

The function of the bill of particulars is to enable the party demanding the particulars to know definitely the claim which he or she must defend against (*Johnson, Drake and Piper v. State of New York*, 43 Misc 2d 513, 251 NYS2d 500, 503). A demand for a bill of particulars may be used to amplify the pleadings, prevent surprise and limit the issues, but may not be used to gain the identity and description of evidentiary material that adverse parties will rely on to prove their claim (*Bassett v. Bando Sangsa Company, Ltd.*, 94 AD2d 358, 464 NYS2d 500, 501, *appeal dismissed* 60 NY2d 962, 471 NYS2d 84).

B. In this case, petitioners have responded to paragraph three of the Division's demand for a bill of particulars. Under these circumstances, petitioners' motion to vacate or modify the demand for a bill of particulars with respect to paragraph three is denied as moot. If the Division considers the response defective, it may pursue the remedies set forth in 20 NYCRR 3000.6(a)(4). Since the Division has withdrawn all of the remaining numbered paragraphs of its demand, they will not be discussed.

C. The information requested in Finding of Fact "6" was not one of the items requested in the bill of particulars. Requiring petitioners to supply this information would be contrary to the section of the Rules of Practice and Procedure which states that a demand for a bill of particulars must be served within 30 days from the date on which the last pleading was served (20 NYCRR 3000.6[a][1]). Accordingly, petitioners are not required to supply the additional information requested.

DATED: Troy, New York
November 13, 1997

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE